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Bioethical Dilemmas and Regulatory Proposals

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Abstract

This article analyzes BDSM as a consensual sexual practice situated at the intersection of Spanish criminal law and bioethics. Drawing on a theoretical framework centred on consent, autonomy, and human dignity, it examines the relevant statutory provisions (arts. 147–150 and 155 of the *Código Penal* [Spanish Criminal Code]), the leading case law (STS 1049/2002 of the *Tribunal Supremo* [Spanish Supreme Court]), and the constitutional limits deriving from public order under the *Constitución Española* [Spanish Constitution]. From a pragmatist consequentialist standpoint, the article proposes a set of minimal regulatory criteria—harm thresholds, verifiable and revocable consent, and evidentiary safeguards—designed to reconcile sexual freedom with the protection of bodily integrity, reduce legal uncertainty, and avoid incentives for clandestine practices.

Keywords: consent; autonomy; human dignity; bodily injury; criminal law; bioethics.

1. Introduction

The central tension raised by BDSM (Bondage, Domination/Submission, Sadism and Masochism), and which this article seeks to address, lies in the collision between autonomy of the will in the sexual domain and the limits imposed by the legal order, particularly with regard to bodily integrity, human dignity, and sexual freedom. In Spain, the current legal framework contains no specific regulation of BDSM, which generates a regulatory gap around these practices. Although no criminal provision prohibits consensual domination-based sexual relations *per se*, the problem arises of the bodily injuries resulting from such encounters: the *Código Penal* (CP, Spanish Criminal Code) classifies as a criminal offence any injury that impairs bodily integrity or health, even where the victim has consented, and treats such consent solely as a ground for mitigation of punishment, not as an exoneration from criminal liability. This legal uncertainty is exacerbated by social factors such as the stigma attached to "non-normative" sexual conduct, which deters many people from reporting incidents or seeking legal protection when undesirable episodes occur. BDSM in Spain thus operates in a grey area from a legal standpoint, without explicit recognition of its distinctive features, raising significant questions about how to reconcile respect for individuals' sexual freedom with the protection of legally protected interests such as bodily integrity and human dignity. The present study explores these questions in depth from an interdisciplinary perspective.

Accordingly, it offers a legal analysis of how the Spanish legal system currently deals with BDSM: it examines the applicable norms (the *Constitución Española* and the *Código Penal*) and the relevant Spanish case law, bringing to light the legal vacuum and the gaps left by the existing framework. The article then incorporates a case-based analysis, discussing representative Spanish jurisprudence (including judgments of the *Tribunal Supremo*) and its reasoning in cases of consensual sadomasochism, as well as comparative references illustrating how the issue has been addressed in other jurisdictions. Finally, building on this

analysis, it advances proposals for a specific regulatory framework for BDSM in Spain: it explores options ranging from legislative reform to jurisprudential guidelines that would recognise these practices while setting clear conditions and limits, with the aim of providing legal certainty both for practitioners and for third parties, without undermining the protection of the fundamental rights of natural persons. The ultimate aim of this work is therefore to offer an integrated and well-grounded account of the intersection between BDSM, law, and bioethics in the contemporary Spanish legal and social context.

2. Theoretical Framework: BDSM, Consent, Autonomy, and Dignity

2.1. Definition and Scope of BDSM in Human Sexuality

Under the label BDSM we find a broad spectrum of non-conventional erotic behaviours characterised by the voluntary adoption of dynamics of power, restraint, and pain within a sexual context; it is therefore useful to unpack the term (Brown et al., 2020). BDSM is grounded in express consent and in a carefully negotiated agreement of wills: unlike violence or abuse, in BDSM all parties wish to participate in the proposed "scene" and set the acceptable limits in advance. One of the core mottos is SSC (Safe, Sane and Consensual): each activity must be carried out safely (minimising physical and psychological risks), with mentally competent (sane) persons who fully understand the nature of what they are doing, and, of course, with explicit consent. Variants of this approach include RACK (Risk-Aware Consensual Kink), which emphasises informed risk-taking by competent adults, as well as other acronyms such as PRICK or CCC, all of which underscore autonomy and responsibility in intense or edge sexual practices.

Prevalence studies indicate that a non-negligible proportion of the global population has experienced domination-related fantasies or play, even if only to a modest degree, which suggests that BDSM is not a marginal phenomenon but is, rather, woven into the sexual lives of society—albeit often in clandestine or strictly private forms (Herbenick et al., 2017; Holvoet et al., 2017; Joyal & Carpentier, 2017; Richters et al., 2003, 2008; Brown et al., 2020; Bezreh et al., 2012; see Table 1).

As summarised in Table 1, population-based surveys from the United States, Canada, Australia, and Europe converge on the conclusion that BDSM-related interests are relatively widespread, even if only a minority of respondents report regular engagement in these practices.

Even if, in the internal moral sphere of its participants, BDSM is legitimised by their autonomous will, from the standpoint of social and legal morality significant reservations arise.

2.2. Personal autonomy, consent and legal limits: doctrinal debate

Within criminal-law doctrine and bioethics, the issue of consent to suffer harm is notoriously contentious. The *Tribunal Supremo* has summarised this debate by noting that "consent in relation to bodily injury has always been doctrinally controversial, with positions oscillating between the non-disposability of the legal interest protected and guaranteed in Article 15 of the *Constitución Española*, and the possibility of attributing relevance to such consent" (Tribunal Supremo, Sala Segunda, 2002). Article 15 of the Constitution enshrines the fundamental right to physical and moral integrity, closely linked to dignity (art. 10.1 CE) and the right to life; from this a traditional interpretation follows according to which bodily integrity is a good of public interest that does not fall entirely within the individual's free disposal (Constitución Española, 1978; Tribunal Constitucional, 1990).

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However, more liberal authors and some philosophers working within autonomy-based ethics invoke the principle of individual liberty (Mill, 1859/2013). From this perspective, the State ought not to interfere in private acts between competent, voluntary adults, however extreme they may be, provided that no third parties are harmed (European Court of Human Rights [ECHR], 1997).

A pragmatist consequentialist ethics would support this position insofar as it can be shown that the outcomes of consensual BDSM practices do not generate social harm comparable to that of non-consensual violent assaults. The analogy with contact sports such as boxing or mixed martial arts illustrates how participants knowingly assume risks of injury within a socially accepted and regulated activity (Domínguez Izquierdo, 2008; Ríos Corbacho, 2011; Alzina Lozano, 2021). These examples show that the socially accepted context and the purpose of the action play a decisive role in the legal assessment of consent: injuring someone in a street fight is not the same as doing so in an operating theatre for therapeutic purposes or in a boxing ring for recreational purposes (Rodríguez-Mourullo, 2004).

Defenders of recognising the validity of consent in BDSM argue that, if such consent is accepted in other domains, it should likewise be accepted in the sexual sphere, as an expression of individuals' freedom to dispose of their own sexuality and bodies, provided that certain proportionality limits are preserved (Brown et al., 2020). Even within pro-autonomy positions, however, qualifications and limits are widely acknowledged. Hardly anyone maintains that consent should legitimate any and every harm: for example, a clear line is drawn at the impossibility of consenting to one's own death, given that consensual homicide and active euthanasia were not lawful in Spain until the enactment of Ley Orgánica 3/2021 on euthanasia in narrowly defined circumstances and under strict safeguards (Gobierno de España, 2021). Similarly, in BDSM practice there is a threshold of intolerable harm, even if the "victim" were to request it: extremely serious injuries, permanent mutilations or situations of life- threatening danger (Tribunal Supremo, Sala Segunda, 2002).

Accordingly, regulatory proposals tend to articulate criteria of tolerable harm (for example, permitting minor or moderate injuries without permanent sequelae, but never irreversible damage) and to insist on the revocability of consent: it must be possible to withdraw consent at any time, and once withdrawn, any subsequent act becomes criminal in the same way as any ordinary assault, pursuant to Article 155 of the *Código Penal* (Código Penal, 1995, art. 155). Under current Spanish criminal law, this safeguard is reflected in the fact that the injured party's consent does not eliminate the offence, but may attenuate it (i.e. lead to a reduced sentence), as will be analysed in detail in the following section (Tribunal Supremo, Sala Segunda, 2002; Código Penal, 1995, art. 155).

The issue, however, is far from theoretically settled. There is ongoing debate as to whether this intermediate solution is satisfactory or whether the law should evolve towards a more permissive or a more restrictive stance (Brown et al., 2020; ECHR, 1997). From this angle, it is legitimately questioned whether consent in contexts of structural power imbalance (e.g. women socialised into submissiveness) can be regarded as fully free (ECHR, 1997). Before engaging with those questions in depth, it is necessary to sketch the current state of the Spanish legal framework, since only then can we clearly establish what the law actually says and how the courts have responded to real cases (Tribunal Supremo, Sala Segunda, 2002; Código Penal, 1995, art. 155).

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2.3. Legal analysis: BDSM and the current legal framework in Spain

2.3.1. Applicable legislation: bodily integrity, sexual freedom, and consent

In the absence of a specific statute governing BDSM, the applicable norms derive from the general *Código Penal* and from constitutional principles (Código Penal, 1995; Constitución Española, 1978). Two legal domains are particularly implicated.

In the first domain, bodily integrity, the Spanish *Código Penal* defines the offence of bodily injury (*delito de lesiones*) in Articles 147 and following (Código Penal, 1995). Article 147.1 CP essentially provides that anyone who causes another person an injury that impairs his or her bodily integrity or physical/mental health and requires medical or surgical treatment shall be punished with a prison sentence of three months to three years, or a fine, etc. Where "weapons, instruments, objects, means, methods or forms specifically dangerous to life or health" are used, the penalty is aggravated (art. 148.1 CP), increasing the range to two to five years' imprisonment (Código Penal, 1995). It is easy to see that many tools and methods typical of BDSM (whips, immobilising ropes, bondage that may cause partial asphyxiation, hot wax, knives used for cutting, electrostimulation, etc.) may fall within the category of "dangerous instruments or methods" for the purposes of Article 148.1 (Tribunal Supremo, Sala Segunda, 2002). By contrast, Articles 149 and 150 CP provide for very severe penalties where the injuries cause loss of organs, disfigurement, or serious permanent damage (up to 8–12 years' imprisonment), although these provisions concern extremely serious injuries (Código Penal, 1995).

A crucial issue here is how the law manages the consent of the injured person. This is where Article 155 of the *Código Penal* comes into play: as a specific clause, it provides for mitigation of the penalty where valid consent has been given (Código Penal, 1995, art. 155; Tribunal Supremo, Sala Segunda, 2002).

In the second domain, sexual freedom, the *Código Penal* as amended by Ley Orgánica 10/2022 (the "Ley de Garantía Integral de la Libertad Sexual," commonly known as the "solo sí es sí" law) redefines sexual offences by placing lack of consent at the centre of the offence of sexual assault (Ley Orgánica 10/2022, 2022). In a fully consensual BDSM scenario, however, the elements of a sexual offence would not be present, since by hypothesis there is neither non-consensual violence nor intimidation, nor absence of consent. At most, one might ask whether certain BDSM practices could be subsumed under criminal provisions on degrading treatment (art. 173 CP) or other offences against moral integrity, but case law tends to reserve these categories for non-consensual conduct or clear contexts of abuse (Código Penal, 1995, arts. 173, 147–148; Tribunal Supremo, Sala Segunda, 2002).

Finally, at the level of civil law and fundamental rights, a private contract whereby an individual agrees to submit to BDSM has no legal effect if it entails a waiver of fundamental rights. In Spain, both the courts and bodies such as the Spanish Data Protection Agency (*Agencia Española de Protección de Datos*, AEPD) have made it clear that contractual clauses of absolute submission or authorisation of degrading acts are null and void for illegality of object, as they violate human dignity (art. 10 CE) (Constitución Española, 1978, art. 10; AEPD, 2019). For example, a 2019 decision of the AEPD imposed a significant fine (€10,000) and ordered the deletion of intimate images of a woman that had been disseminated via WhatsApp without her consent, stressing that any generic or past consent to being recorded does not amount to valid authorisation for later public dissemination, especially where dignity and the right to one's own image are at stake (AEPD, 2019). The message is clear: certain personality rights possess a non-disposable core, and consent must be specific and revocable; otherwise, public-order norms protecting the person are violated (Constitución Española, 1978, arts. 10, 18).

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The expressed will of a submissive person agreeing to be subjected to particular displays, insults, humiliations, or assaults does not, in itself, constitute a sufficient legal title to shield the "dominant" from potential liability. This approach is in line with the case law of the European Court of Human Rights, which in BDSM-related cases has held that individuals cannot waive their fundamental rights and that the State is entitled to limit violent practices even where they are consented to, without thereby violating the right to respect for private life under Article 8 of the European Convention on Human Rights (Consejo de Europa, 1950, art. 8; ECHR, 1997). In *Laskey, Jaggard and Brown v. the United Kingdom*, the ECtHR upheld criminal convictions against members of an English sadomasochistic group, finding no violation of the Convention because public health and the protection of citizens against serious injuries were at stake, and affirming that there exists a threshold of harm that society will not tolerate even in the private sphere (ECHR, 1997).

In summary, the Spanish regulatory landscape can be described as follows: BDSM practices are not expressly prohibited, provided they remain within the intimate sphere of competent, consenting adults; however, if bodily injuries occur in the course of such practices, the person who caused them may incur criminal liability for those injuries—regardless of any contract or explicit agreement, since the law prioritises the protection of bodily integrity (Código Penal, 1995, arts. 147–150, 155; Tribunal Supremo, Sala Segunda, 2002). Consent will, nonetheless, serve to mitigate the penalty under Article 155 CP, except in cases involving particularly vulnerable persons (minors or persons with disabilities), where consent does not even operate as a mitigating factor (Código Penal, 1995, art. 155). As already noted, this is an intermediate solution that seeks to reconcile autonomy without entirely abandoning the legal interest in bodily integrity, but it also generates a regulatory gap and legal uncertainty around BDSM, as will become clearer in the following subsection through the analysis of concrete cases (Tribunal Supremo, Sala Segunda, 2002; AEPD, 2019).

2.3.2. The "legal vacuum" and the need for specific regulation

It is important to underscore that, despite the intimate and sensitive character of BDSM, the issues it raises are far from a purely theoretical abstraction: criminal law and bioethics have already been compelled to confront them in practice. Where sexually coded practices involving the infliction of pain remain within thresholds of moderate injury and take place between competent, informed, and voluntary adults, the legal system tends *de facto* to tolerate them, even if it does not fully recognise consent as a ground of justification. By contrast, where the outcome approaches the destruction of legally non-disposable goods (life, severely impaired bodily integrity, or dignity understood in its objective dimension), consent ceases to operate even as a significant mitigating argument.

Accordingly, the legal treatment of BDSM practices is structured around a constitutive tension: on the one hand, the recognition of sexual autonomy and the freedom to shape one's own bodily project; on the other, the State's determination to preserve certain non-renounceable limits linked to the protection of life, integrity, and dignity. Bioethical adjudication situates itself precisely on this threshold: it must assess to what extent informed, specific, continuous, and revocable consent can legitimise the assumption of risk in the erotic domain, and at what point the political community is required to intervene, even against the wishes of the participants, in order to prevent the language of "play" from masking dynamics of violence, objectification, or extreme harm that overflow the framework of sexuality freely exercised.

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Equally noteworthy in this respect are the judgment of the Audiencia Provincial of Zaragoza (Third Section) no. 70/2000 of 29 June 2000 and the Supreme Court decision STS 1049/2002 of 5 June 2002 (Audiencia Provincial de Zaragoza, Sección 3.ª, 2000; Tribunal Supremo, Sala Segunda, 2002). The latter is perhaps the most emblematic and didactic BDSM-related case ever decided by the Spanish Supreme Court. According to the factual background of the judgment, a couple, by mutual agreement, engaged in an intense sadomasochistic session during which the woman (the injured party) suffered multiple significant injuries. The medical report described numerous bruises all over her body – back, lumbar area, deltoids, arms, thighs – as well as abrasions, small skin ulcerations and swelling in sensitive areas, including the vaginal mucosa (Tribunal Supremo, Sala Segunda, 2002). The *Audiencia Provincial* of Zaragoza convicted the man (the dominant partner) of an offence of bodily injury and sentenced him to two years' imprisonment. The defendant appealed to the Supreme Court on points of law, arguing, among other things, that the aggravating circumstance in Article 148.1 should not have been applied, since the means used – whips, handcuffs, etc. – should not be regarded as "dangerous" within the meaning of the provision, and implicitly seeking a greater reduction of the sentence on the basis of the victim's consent (Audiencia Provincial de Zaragoza, Sección 3ª, 2000; Código Penal, 1995, art. 148; Tribunal Supremo, Sala Segunda, 2002).

In its judgment 1049/2002, the Supreme Court undertook an extensive analysis. First, it confirmed that the means used did indeed fall within the aggravated form of Article 148.1: such methods (burns, whipping, handcuffing, intense manual restraint, assaults, etc.) clearly constitute "forms or methods dangerous to health" for the purposes of the statute (Código Penal, 1995, art. 148; Tribunal Supremo, Sala Segunda, 2002). The *Audiencia* had pointed out that in this case there was no *dolo eventual* (recklessness as to the result) but direct intent, since the injuries were caused deliberately and intentionally pursued by the agent. The Supreme Court agreed that this dogmatic distinction had no practical impact on liability, since in either case an offence was made out (Tribunal Supremo, Sala Segunda, 2002).

The crucial point was therefore consent. The Supreme Court acknowledged that full consent on the part of the victim was present: she was an adult who voluntarily agreed to the practices, fulfilling all the requirements of valid, free, spontaneous and express consent. Consequently, the Court partially upheld the appeal, but solely for the purpose of applying Article 155 CP and reducing the sentence. The Supreme Court considered an reduction of one degree (six months less) to be appropriate, arguably in view of the seriousness of the injuries, and declined to reduce it by two full degrees (Código Penal, 1995, art. 155; Tribunal Supremo, Sala Segunda, 2002). Judgment 1049/2002 thus became the leading Spanish precedent on consensual sadomasochism. From it, at least two doctrinal conclusions can be drawn (Tribunal Supremo, Sala Segunda, 2002):

1. Consent does not justify such conduct, but it does oblige the court to reduce punishment (albeit "always with caution," as the Supreme Court warns, given the special nature of these cases).

2. The Court notes that the earlier case law had only addressed BDSM in contexts of extremely serious outcomes and that this was the first case involving prolonged physical injury within a sexual "game". The Supreme Court's reasoning explicitly recognises the doctrinal tension mentioned above: it concedes that Article 155 CP is a legislative solution that confines the relevance of consent to a mitigating factor, so the debate over the disposability of the protected legal interest has not been definitively resolved. In doing so, it consolidates a conservative line: bodily integrity is a good protected by the State even against the person herself; it yields only relatively (through a reduction of penalty) to sexual autonomy, but without abandoning punishment (Código Penal, 1995, art. 155; Tribunal Supremo, Sala Segunda, 2002).

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Since 2002, there have been few further Supreme Court decisions specifically on BDSM. However, some cases at the level of provincial courts and first-instance courts have attracted attention.

Spanish case law has thus made clear that there is an objective legal limit in the realm of sexual practices: actual bodily harm. A mutual agreement or contract to engage in BDSM can certainly be signed, but it will not shield the dominant partner from criminal liability if an offence of bodily injury is committed and ultimately comes to the attention of the courts (Código Penal, 1995, arts. 147–148, 155; Tribunal Supremo, Sala Segunda, 2002). This reality illustrates the persistence of the current legal vacuum: BDSM participants lack clear legal protection in the event of an undesirable situation, which in turn encourages the community to operate in the shadows, with little incentive to report abuse or seek help without risking becoming the very object of sanctions (AEPD, 2019; Constitución Española, 1978; Tribunal Supremo, Sala Segunda, 2002).

In sum, the jurisprudential landscape described here – oscillating between the strict non-disposability of life and the cautious mitigation of the wrongfulness of the act when there is express consent between competent adults – reveals a normative and hermeneutical gap. Spanish criminal law sanctions the injurious result even in sexually consensual contexts, yet it recognises (without fully justifying) the relevance of consent as a factor of modulation (Código Penal, 1995; Tribunal Supremo, Sala Segunda, 2002). This intermediate solution, which zealously protects bodily integrity while conceding a limited exculpatory effect to erotic agreements, does not resolve the underlying aporia: in a liberal and plural society, what axiological weight and practical reach should we attribute to personal autonomy and sexual freedom when they are exercised precisely through non-conventional and potentially harmful practices?

To address this tension rigorously – between the protection of non-disposable goods and respect for informed, self-attributive decisions – it is necessary, at least temporarily, to step back from judicial casuistry and refocus on the theoretical core of consent: its structure, its limits, and its safeguards (Brown et al., 2020; UNESCO, 2005).

2.4. Autonomy and consent: sovereignty over one's own body

The principle of personal autonomy is central to contemporary ethics, as it entails the right of every competent individual to make decisions about their own life, body, and life project in accordance with their values and desires, free from undue interference (UNESCO, 2005). Transposed to the field of BDSM, autonomy translates into sexual freedom: the right to choose with whom, when, and how to engage in sexual relations, including the right to explore non-conventional forms of sexuality, provided there is agreement among the parties involved (Brown et al., 2020). In BDSM, consent is genuinely the cornerstone that distinguishes an ethical practice from abuse (Bezreh et al., 2012). In terms of beneficence, many participants report positive effects: improved communication within the couple, stress relief, and the fulfilment of fantasies that increase subjective well-being. A field study on the BDSM scene in Spain found that practitioners themselves identify as main benefits the intensity of the bond, greater self-knowledge of personal limits, and the emotional catharsis they experience (Carrera García, 2020).

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However, autonomy in BDSM contexts is not free of difficulties. The ideal of informed consent requires that the person involved understand the physical risks (from burns and bruises to more serious potential accidents such as complicated asphyxia or cutting injuries) and the psychological risks (emotional triggers, possible post-traumatic stress in adverse scenarios, unexpected feelings of guilt or shame). Good practice within the community involves extensive prior communication, detailed negotiation of limits, and progressive learning. Yet there is always the possibility that someone may underestimate their own reaction to certain extreme stimuli, or that, through inexperience, they may misjudge the skill of the partner or the dangerousness of a particular method. From a bioethical standpoint, consent in BDSM ought to be a continuous process: an initial "yes" is not enough; it must be reassessed as the situation unfolds, and both participants must remain alert to signs – including non-verbal ones – of discomfort.

Autonomy can also be compromised by contextual pressures or pre-existing power dynamics. Although in theory BDSM is a role-play that ends when the session ends, what happens if the relationship between the individuals is marked by external asymmetries? Consider, for instance, a couple in which one partner wants to please the other and accepts practices they do not truly desire, for fear of losing them; or someone with low self-esteem who immerses themselves in a self-destructive submissive role because they believe they do not deserve better treatment.

An ethics focused on "good intentions" might be inclined to presume a benevolent desire to please out of love; a consequentialist lens, however, would examine whether that pattern entails psychological harm for the person (reinforcing their low self-esteem or exposing them to abuse). Bioethics thus prompts us to ask: is this genuine autonomy, or are there elements of alienation? The notion of affirmative, enthusiastic consent – borrowed from anti–sexual-violence activism – is particularly relevant here: the best safeguard is that the person not merely say "OK, do it" out of inertia or emotional pressure, but that they genuinely wish to undergo the proposed experience.

Finally, autonomy entails responsibility for consequences, which means that if an individual consents to participate in something risky, they must also assume their share of responsibility for what happens. Morally, one might say that they share the risk, but juridically, as we have seen, liability falls primarily on the person who inflicts the injury.

That said, a robust recognition of autonomy and of consent that is informed, specific, continuous, and revocable – cornerstones that allow us to distinguish ethical play from abuse – does not exhaust the normative problem. BDSM practice, precisely because it dramatizes role asymmetry and incorporates performative elements of humiliation or symbolic objectification, activates a second axis of analysis that is less subjective and more objective-institutional: that of human dignity as a non-disposable constitutional value and a parameter of public order. Put differently: although qualified consent may morally legitimise the experience for its protagonists and, from a consequentialist viewpoint, allow for a micro-level balancing of benefits and risks, the political community remains bound to ask whether certain configurations of harm, exposure, or degradation erode social standards of mutual respect whose protection cannot be traded away through private agreements.

This is the point at which self-attributed sexual freedom must enter into dialogue with the limits imposed by dignity in its objective dimension, as well as with the requirements of proportionality, non-instrumentalisation, and non-exploitation. With this shift – from consent as a criterion of intersubjective permissibility to dignity as a safeguard of non-renounceable minima – the pragmatic-consequentialist evaluative framework is completed: the aim is not to oppose autonomy and dignity, but to articulate them in order to distinguish between scenarios compatible with responsible self-affirmation and practices that, by their very structure or by their foreseeable effects, cross thresholds that the law ought not to

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allow. Clarifying those thresholds and their legal and bioethical implications is the task of the following section.

2.5. Human dignity and degrading treatment: can dignity be "played with"?

Human dignity is a complex concept, particularly within the Continental legal tradition. It attributes to the person an intrinsic, inviolable worth that prevents her from being objectified or reduced to a mere means. In Spain this concept is a constitutional pillar (art. 10 CE) and has permeated both legislation and case law (Constitución Española, 1978, art. 10.1). At first sight, BDSM practices – especially those involving domination/submission and erotic humiliation – seem to clash head-on with the notion of dignity: we encounter situations in which someone is tied up, insulted, treated as a "slave" or a "bitch," sometimes even displayed naked before third parties.

One possible approach is to distinguish between ontological dignity (intrinsic and non-renounceable) and experiential or subjective dignity. Ontologically, one might argue that dignity is not lost, because the person remains a free moral agent who has decided to adopt that role temporarily; their dignity would lie precisely in their autonomous capacity to choose even experiences of submission (Andorno, 2009). They are not being treated as an object against their will; rather, they "objectify" themselves as part of a game, ultimately retaining control through their ability to stop the scene at any time (Bezreh et al., 2012). Indeed, some submissive participants report that, paradoxically, such experiences affirm their personal dignity, insofar as they involve a high degree of trust and a profound acceptance of who they are (Brown et al., 2020; Carrera García, 2020).

However, dignity in its objective–social dimension does become strained: a society that normalised public spectacles of humiliation could be undermining the very sense of mutual respect (Beyleveld & Brownsword, 2001). This is why even the BDSM community itself typically keeps these practices within private or closed circles, aware that bringing them into public space would be problematic (Brown et al., 2020). The AEPD Resolution PS/00334/2019 sanctioned the dissemination, via WhatsApp, of intimate images of a woman by her ex-partner, stressing that any prior consent to being recorded does not amount to valid authorisation for disclosure to third parties. Because the case involved the non-disposable core of dignity and the right to one's own image, the Agency deemed generic authorisation clauses invalid, required specific and revocable consent, and ordered the deletion of the disseminated material (AEPD, 2019). This approach converges with the doctrine of the European Court of Human Rights: in S/M cases, the ECtHR has held that the State may limit violent practices even when they are consented to, without breaching Article 8 ECHR, thereby marking a threshold of harm that society will not tolerate even in private (ECHR, 1997).

From a bioethical perspective, the value of dignity calls for caution in the face of prolonged or extreme objectification. A brief "game" in which someone is called a "slave" may not erode their self-esteem or social standing; but a 24/7 relationship imposing continuous submission could, in the long term, undermine agency and life development (UNESCO, 2005; Andorno, 2009). Some strands of contemporary bioethical reflection would argue that the State has a legitimate interest in preventing situations of prolonged domination that may evolve into abuse, even where there was initial consent (Andorno, 2009; Beyleveld & Brownsword, 2001).

Adopting a pragmatist lens, we can examine concrete effects and how they should be weighed ethically:

- Effects on individuals: for many adults, BDSM is a source of pleasure, release, and community; participants report improvements in communication, stress relief, and

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the fulfilment of fantasies that increase well-being (Brown et al., 2020; Bezreh et al., 2012; Carrera García, 2020).

- Potential negative effects: there are risks of physical injury and psychological impact if limits are crossed or if practices are poorly executed; hence the importance of continuous consent, negotiation, and education. Escalation patterns – the search for ever more intense stimulation – have also been described in certain subgroups, which calls for a risk-aware, gradual approach (Holvoet et al., 2017; Joyal & Carpentier, 2017).
- Effects on third parties: population-based evidence does not show an association between BDSM interest and violent behaviour towards others; rather, it suggests that consensual BDSM fantasies and practices are relatively common in the general population, which helps to distinguish them from the criminal domain (Herbenick et al., 2017; Richters et al., 2008; Joyal & Carpentier, 2017).
- Legal effects: any framework that recognises consent in the context of bodily injuries must incorporate strong evidentiary safeguards so that perpetrators cannot disguise assaults as mere "play" (Código Penal, 1995, arts. 147–148, 155; Tribunal Supremo, Sala Segunda, 2002).
- Sociocultural effects: there are communities with ethical codes and safety workshops, but also toxic environments. A pragmatist solution recommends education in SSC/RACK practices and safe spaces (clubs, workshops, peer supervision), combined with clear legal limits (Brown et al., 2020; Bezreh et al., 2012).

In conclusion, from the standpoint of bioethics and practical ethics, consensual BDSM is morally defensible if autonomy and risk management are respected, and if safeguards are in place to prevent serious unintended harm (UNESCO, 2005; Brown et al., 2020). That moral balance ought to be reflected in any future regulatory adjustments, without abandoning the protection of dignity and bodily integrity (Constitución Española, 1978; Código Penal, 1995).

Thus, the analysis of dignity – in its dual ontological and intersubjective dimensions – completes the ethical–normative framework within which sexual autonomy, qualified consent, and non-disposable constitutional limits confront one another. But, as is well known, the law does not unfold only in abstractions: it must test its principles against the variability of facts and the concrete texture of intimate relationships in which BDSM is enacted – settings of trust, vulnerability, and risk where the line between erotic empowerment and punishable harm can become subtle. At this point, theoretical reflection demands pragmatic verification: how do legal practitioners react to consensual practices that, by their outcomes, trigger criminal or administrative intervention? What criteria do courts use to distinguish legitimate play from concealed abuse? And, above all, up to what threshold does the legal order accept the voluntary management of harm in the sexual sphere before imposing a ban in the name of the public interest?

To address these questions – and to avoid giving the reader the false impression that there is a peaceful consensus between principles, experiences, and applied norms – it is necessary to descend into case analysis. For it is in borderline cases and grey areas, where consent is invoked but harm is observable, that the true position of the law emerges and the gaps and frictions become visible which any future regulation should confront with greater precision. The next section is devoted to that task.

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3. Case Studies: A Practical and Jurisprudential Analysis

To complement the theoretical discussion, it is useful to examine practical cases and their possible legal treatment, beyond the Supreme Court landmarks already mentioned.

Case 1: a couple decides to introduce spanking and bondage into their intimate life, resulting in visible marks on the buttocks and thighs of the submissive partner. This very common scenario reveals a grey area in which many BDSM practices remain outside the reach of the legal system simply because they generate no signal towards it. From a bioethical standpoint, one might speak of a tacit truce: as long as BDSM remains at a "safe" level (i.e., without serious harm) and in the private sphere, the State does not intervene, thereby de facto respecting autonomy (Brown et al., 2020). However, this same situation can become problematic if at some point the injured party wishes to report an excess that occurred during the scene: in the absence of medical evidence or witnesses, it would be difficult to prove what happened and, even more so, to differentiate whether there was consent or not. For this reason, within BDSM communities it is often recommended to document agreements and prior negotiation (messages, limits, safewords) to minimise misunderstandings (Bezreh et al., 2012).

Case 2. Consider a BDSM session in which, without intention on either side, the situation briefly gets out of control: the dominant partner compresses the submissive's neck slightly longer than intended, causing a transient loss of consciousness. Alarmed, the dominant stops the scene and provides care; the submissive appears to recover, but the following day experiences dizziness. A physician issues a medical report; if there is an injury requiring treatment or the use of dangerous methods is noted, the typical legal classification would be bodily harm under Articles 147–148 of the Spanish Criminal Code, with a possible aggravation for dangerous means (Código Penal, 1995, arts. 147–148; Tribunal Supremo, Sala Segunda, 2002). Although the injured party might affirm that the conduct was consensual, such consent merely attenuates the penalty; it does not eliminate the unlawfulness of the offence (Código Penal, 1995, art. 155; Tribunal Supremo, Sala Segunda, 2002). This case shows how the criminal machinery can be set in motion even against the wishes of the affected person, precisely in order to protect potential victims; in practice, the outcome often depends on how credible the alleged consent appears and on the seriousness of the injuries (Tribunal Supremo, Sala Segunda, 2002).

Case 3. Suppose that, in a BDSM session, the dominant causes injuries to the submissive and the matter ends up in court. Could the specific offence or aggravating circumstance of gender-based violence under Article 153.1 of the Criminal Code (when a man injures his female partner) be applied? Here we enter the terrain of gender violence and abuse against women in intimate relationships. This is a complex, case-sensitive issue that lacks fully consolidated case law on BDSM from the Supreme Court. In any event, the offence requires both injury and a partner relationship, and any eventual consent could only attenuate the penalty under Article 155 of the Criminal Code, without excluding criminal responsibility (Código Penal, 1995, arts. 153.1, 155; Tribunal Supremo, Sala Segunda, 2002). In practice, and to avoid confusion with non-consensual violence, it would be desirable for a specific regulation to require reinforced evidentiary safeguards (for example, records of prior communications, established practice habits) (Brown et al., 2020; Bezreh et al., 2012).

Case 4. The previously mentioned case of intimate images shared via WhatsApp provides a further illustration. In that case, the former partner disseminated intimate images without consent, and the Spanish Data Protection Agency (AEPD) held that any prior, generic consent to being recorded did not legitimise subsequent dissemination to third parties (Agencia Española de Protección de Datos [AEPD], 2019). The AEPD underlined the non-disposable nature of the core of dignity and the right to one's own image, and recalled that consent in the field of personal data must be specific and revocable. This approach coheres with the protective line that prohibits the public commodification of the person, even where

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there was an agreement in a different, private context, and is consistent with the European Court of Human Rights' case law in *Laskey, Jaggard and Brown v. the United Kingdom* (European Court of Human Rights, 1997), which accepts State limits on violent or degrading practices even when consent is present, without violating Article 8 ECHR.

Taken together, these cases underscore: (a) the private normality of mild BDSM practices; (b) the activation of public intervention once clinically relevant injuries appear; (c) the boundary with gender-based violence in situations of abuse within intimate relationships; and (d) the protection of personality rights (image, dignity) against contractual clauses that purport to authorise broad exposure. All this reinforces the need for clear protocols and education in safe practice frameworks (SSC/RACK), under conditions of continuous and documented consent (Brown et al., 2020; Bezreh et al., 2012; AEPD, 2019).

The cases discussed not only illustrate the evidentiary complexity that emerges when desire and harm become entwined, but also highlight the structural insufficiency of the current regulatory framework. Sexual autonomy is tolerated so long as it remains invisible and without clinical consequences; yet as soon as the "play" results in bodily injury or comes into tension with other categories—gender violence, human dignity, personality rights, or the public interest in protecting bodily integrity—criminal law intervenes through categories originally designed for different realities, often yielding reactive and inconsistent solutions (Código Penal, 1995; Tribunal Supremo, Sala Segunda, 2002; AEPD, 2019).

In this setting, the legal response oscillates between preventive paternalism, which distrusts consent in risky contexts, and "monitored autonomy", which recognises consent only to modulate punishment but never to exclude unlawfulness. Such ambivalence generates legal uncertainty for both legitimate practitioners and potential victims, and fuels the clandestinity that hinders the protection of individuals facing genuine abuse.

Accordingly, after observing the practical outcomes of case law and the gaps it leaves open, it is necessary to move from diagnosis to normative design: not in order to legitimise or promote BDSM, but to delimit, in legal terms, when informed consent ought to prevail and when it must yield to non-disposable goods, so that State protection does not turn into oppression or, conversely, into neglect. The next section is therefore devoted to articulating proposals for a prudent and rights-protective regulatory framework that harmonises autonomy, safety, and dignity in the domain of BDSM practices.

4. Proposals for a Specific Normative Framework on BDSM in Spain

In light of the foregoing – theoretical principles, the current legal framework, the bioethical perspective, and the practical cases – it is appropriate to ask what options exist to improve the regulatory treatment of BDSM in Spain. The aim of any possible framework would not be to "promote" BDSM – that is not the role of the law – but to provide legal certainty and adequate safeguards: both for those who practice it in good faith and for society at large, by ensuring that consented situations can be distinguished from covert abuses and that risks are appropriately limited (Constitución Española, 1978; Código Penal, 1995; Tribunal Supremo, Sala Segunda, 2002; Agencia Española de Protección de Datos [AEPD], 2019; European Court of Human Rights, 1997; Brown et al., 2020; Bezreh et al., 2012). Various authors and community groups have suggested alternatives ranging from statutory reform to soft-law instruments (guidelines, protocols). The most discussed measure would be amending the Criminal Code to introduce a provision expressly exempting or more clearly modulating the punishability of injuries caused in the context of consensual sexual practices (Código Penal, 1995, arts. 147–148, 155; Tribunal Supremo, Sala Segunda, 2002).

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Consequently, if the objective is to translate into positive law the – ethically and legally decisive – distinction between unjust harm and harm voluntarily assumed in consensual sexual contexts, the next step requires operationalising these principles in concrete legislative techniques. This involves defining thresholds of harm, criteria of proportionality and foreseeability (lex certa), and evidentiary standards capable of preventing fraud (simulated consent), while at the same time preserving the non-disposable core of dignity and bodily integrity (Constitución Española, 1978; Código Penal, 1995; Tribunal Supremo, Sala Segunda, 2002; AEPD, 2019; European Court of Human Rights, 1997; Brown et al., 2020; Bezreh et al., 2012). On this grid of safeguards, several paths of normative engineering can be explored – from narrowly framed justification clauses to qualified mitigating circumstances and specific evidentiary safeguards – that would enable courts to determine with precision when informed and verifiable consent neutralises wrongfulness or, at least, modulates punishment without opening loopholes for abuse (Código Penal, 1995, arts. 147–148, 155; Tribunal Supremo, Sala Segunda, 2002). The main options and their conditions of possibility can be outlined as follows:

1. Limited exclusion of wrongfulness (justification): for example, adding a specific paragraph to Article 155 of the Criminal Code (or to Articles 147–148) stating that minor injuries inflicted in the context of freely consented sexual practices between adults shall not be punishable, provided that they do not seriously endanger health or life (Código Penal, 1995, arts. 147–148, 155; Tribunal Supremo, Sala Segunda, 2002). By way of comparison, one may consider §228 of the German Strafgesetzbuch, which allows consented bodily harm unless it is contrary to "good morals" (*gute Sitten*), and the restrictive approach adopted in *R v Brown* in the United Kingdom (Bundesministerium der Justiz, n.d.; United Kingdom House of Lords, 1993).

2. Qualified mitigating factor or conditional excuse: alternatively, the scope of Article 155 of the Criminal Code could be broadened (or reinforced as a specific mitigating factor under Article 21 CP) to allow proportionate responses in clearly consensual cases involving minimal harm (Código Penal, 1995, arts. 21, 155; Tribunal Supremo, Sala Segunda, 2002).

3. Safeguards and evidence: in any event, clear limits should be set (no exclusion where there are very serious injuries, risk of death, use of weapons, deception or coercion) and the law should require specific, verifiable consent, supported by SSC/RACK-type good practices, without unduly invading privacy (Código Penal, 1995; AEPD, 2019; European Court of Human Rights, 1997; Brown et al., 2020; Bezreh et al., 2012).

4. Comparative criteria of "social adequacy": few foreign jurisdictions have explicitly addressed BDSM in their statutes, but doctrinal debates often invoke concepts such as "social adequacy." In Germany, the case law tacitly accepts consent to minor injuries in sexual play by treating them as socially adequate under §228 StGB (Bundesministerium der Justiz, n.d.). A Spanish provision could build on this model, requiring that consent be clearly documented, that injuries do not exceed a certain level (e.g., no permanent sequelae and no need for more than first medical assistance), and that there be no intent to harm outside the sexual context.

5. Expanded qualified mitigation or conditional excuse**:** if full justification is deemed undesirable, Article 155 CP could at least be reformulated to give judges wider discretion. At present it provides for "one or two degrees" of reduction; this could be extended to "one to three degrees," or even allow exemption from punishment where the consequences are clearly minimal (Código Penal, 1995, arts. 21, 155; Tribunal Supremo, Sala Segunda, 2002). Another option would be to relocate this previsión into Article 21 CP (mitigating circumstances), so that it always operates

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as a very significant mitigation, enabling symbolic penalties or effectively neutralising the practical impact of conviction in clearly consensual, non-serious cases.

6. Administrative regulation/licensing: applying a licensing model to intimate BDSM is both complex and generally unwelcome among practitioners. Nonetheless, it might be considered for clubs or venues that comply with safety regulations and provide SSC/RACK-based training, without extending such requirements to private domestic settings.

7. Clear limits to prevent abuse: consent would have no legal validity in cases of extremely serious injury, risk of death, use of weapons, or where consent is obtained through deception or coercion. With respect to the dissemination of intimate images, consent must be specific and revocable, consistent with Article 197 CP and data-protection doctrine (Código Penal, 1995, art. 197; AEPD, 2019; European Court of Human Rights, 1997; United Kingdom House of Lords, 1993).

8. Verifiability of consent: as an additional safety element, the law might require that consent be objectively verifiable – for instance, documented before the session in some form (text message, audio recording, etc.). This proposal is controversial, since many people find it absurd to "sign a contract" before having sex, as it undermines spontaneity, but from a legal perspective it would substantially facilitate subsequent defence in court (Código Penal, 1995, arts. 147–148, 155; Tribunal Supremo, Sala Segunda, 2002; Brown et al., 2020; Bezreh et al., 2012). A complementary safeguard would be to require that consent be specific to particular practices: a vague "do whatever you want with me" would not suffice to decriminalise, for example, whipping, unless the person had explicitly consented to whipping.

9. Training and guidance for legal and healthcare professionals: while awaiting legislative reform, protocols or guidelines could be developed for judges, prosecutors and healthcare staff. Emergency clinicians, for instance, could be trained to record – tactfully – when a patient reports that injuries occurred in a consensual sexual context, while still fulfilling any mandatory reporting obligations (Brown et al., 2020; Bezreh et al., 2012).

10. Guidance for prosecutors and judges: in the absence of a specific statute, non-binding circulars or agreements could be issued to harmonise criteria of intervention and assessment in BDSM-related cases (Código Penal, 1995; Tribunal Supremo, Sala Segunda, 2002).

11. Training on non-conventional sexualities: operators in the justice and health systems should receive basic training in non-normative sexual practices: understanding safe words, prior negotiation and ongoing consent, and recognising that BDSM roles do not necessarily imply inequality outside the scene (Brown et al., 2020; Bezreh et al., 2012; UNESCO, 2005).

12. Protection against abuse and misunderstandings: a framework more accommodating of BDSM should not be focused solely on "allowing" practices, but also on protection. This means ensuring that the law differentiates clearly between genuine consent and abusive dynamics, and that those who report boundary violations are not stigmatised or ridiculed for having initially consented to a practice that later "got out of hand" (Brown et al., 2020; Bezreh et al., 2012; AEPD, 2019; Código Penal, 1995).

13. Registering revoked "harmful consents": it should be made explicit that the victim does not incur liability for having initially consented; criminal responsibility rests

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with the perpetrator. From a cultural and institutional perspective, it is crucial to avoid blaming the complainant who says, "I agreed at first, but it went too far" (Brown et al., 2020; Bezreh et al., 2012; Código Penal, 1995, arts. 147–148, 155; Tribunal Supremo, Sala Segunda, 2002; UNESCO, 2005).

14. Clear delimitation of revoked consent: ignoring a safe word or a clear request to stop must be treated as a gravely aggravating factor, and this should be explicitly reflected in protocols and evidentiary assessment: once consent is withdrawn, any further conduct is to be treated as assault like any other (Código Penal, 1995; Tribunal Supremo, Sala Segunda, 2002; United Kingdom House of Lords, 1993).

15. Sanctions for non-consensual dissemination of content: article 197 CP should be applied – and, if necessary, reinforced – with specific aggravating factors where intimate images from alternative sexual contexts are shared without consent, in line with data-protection case-law and the protection of dignity and privacy (Código Penal, 1995, art. 197; AEPD, 2019).

16. Mediation or arbitration mechanisms within the community: it would be advisable to promote kink-aware mediation by trained professionals for minor conflicts before escalating to criminal proceedings. For example, if a dominant has exceeded an agreed limit but the submissive does not wish to "ruin their life" with a criminal record, mediation might enable an agreement (apology, reparations, written undertaking not to contact the person again, etc.). Some countries already have kink-aware mediators or therapists who assist in such cases; public support for similar figures would be a positive step (Brown et al., 2020; Bezreh et al., 2012).

17. Comparative inspiration: although no European country has enacted a "BDSM Act" as such, certain approaches can serve as inspiration. In the United Kingdom, following *R v Brown*, which criminalised S/M causing appreciable harm, no legislative reform has been adopted to permit such practices (United Kingdom House of Lords, 1993). More recently, debates over "rough sex" defences in cases of accidental death or serious injury during sexual acts have been framed against the harm thresholds recognised by the European Court of Human Rights (European Court of Human Rights, 1997). Spain could move ahead by clarifying the legality of minor injuries in rough sex, and by drawing on the German model of §228 StGB, which allows consented harm unless contrary to good morals (Bundesministerium der Justiz, n.d.). Combining these approaches, Spain might consider a comprehensive reform with the following elements: (a) a legal definition or at least formal recognition of BDSM (not as moral approval, but as a descriptive category); (b) a limit on permissible consented harm (e.g., no permanent sequelae and no life-threatening situations); and (c) a reinforced evidentiary procedure and robust protection of dignity, such that clearly degrading practices remain prohibited even if someone "consents" (Constitución Española, 1978; Código Penal, 1995; Tribunal Supremo, Sala Segunda, 2002; AEPD, 2019; European Court of Human Rights, 1997; Brown et al., 2020; Herbenick et al., 2017; Holvoet et al., 2017). Making BDSM visible through clear rules could, in fact, reduce clandestine allure and encourage people who so wish to inform themselves and practise more safely, thereby decreasing accidents (Brown et al., 2020; Herbenick et al., 2017; Holvoet et al., 2017).

From the opposite side, some members of the BDSM community may reject any regulatory attempt as an undue state intrusion into intimacy. This concern is understandable: do we really need a "bedroom law"? Yet, given that criminal law already enters the bedroom whenever injuries occur, a specific regulation could actually function as a way of limiting state intervention as far as possible by delineating the boundaries beyond which it will not interfere (Código Penal, 1995; Tribunal Supremo, Sala Segunda, 2002; AEPD, 2019; European Court of Human Rights, 1997). Many practitioners would advocate

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a minimalist solution: leave us alone as long as there is no serious harm and no genuine allegations of abuse.

In conclusion, it appears both feasible and desirable to partially decriminalise consented injuries in BDSM, while preserving the State's punitive capacity for cases of clear excess or real danger. This would balance sexual autonomy rights (linked to Article 18 of the Spanish Constitution on privacy and the right to one's own image, which includes decisions about sexuality) with the safeguarding of bodily integrity (Article 15 CE), in line with the jurisprudence of the Tribunal Supremo and the guarantees developed by the AEPD and the European Court of Human Rights (Constitución Española, 1978, arts. 10.1, 18; Código Penal, 1995; Tribunal Supremo, Sala Segunda, 2002; AEPD, 2019; European Court of Human Rights, 1997; Brown et al., 2020; UNESCO, 2005).

Of course, any such changes should be accompanied by subsequent monitoring and, where possible, empirical data on their impact. In a field as sensitive as this, ongoing feedback from practice – a pragmatist approach – would allow the framework to be adjusted over time, ensuring that it continues to promote well-being and justice (Brown et al., 2020; UNESCO, 2005).

5. Conclusions

The analysis developed throughout this article allows us to draw several fundamental conclusions about the relationship between BDSM, Spanish law, and bioethics, clarifying both the main challenges and possible avenues for addressing them.

First, BDSM – understood as a set of sexual practices based on consensual domination, submission, pain, and restriction – is neither an aberrant anomaly nor something extraneous to our society, but rather one (albeit minority and stigmatised) manifestation of sexual freedom (Brown et al., 2020; Herbenick et al., 2017; Joyal & Carpentier, 2017).

At the theoretical level, BDSM foregrounds the central importance of consent and personal autonomy in sexual ethics: it is precisely explicit consent that distinguishes these practices from violence or coercion (Bezreh et al., 2012; UNESCO, 2005). We have seen that, in Spain, the thesis of the relative non-disposability of bodily integrity has prevailed – a position consolidated in the case law of the *Tribunal Supremo*: individuals enjoy sexual freedom, but they cannot legally authorise others to cause them bodily harm beyond a limited range in which punishment is merely mitigated rather than excluded (Constitución Española, 1978, arts. 10, 15; Código Penal, 1995, arts. 147–148, 155; Tribunal Supremo, Sala Segunda, 2002).

The analysis of the current legal framework reveals a genuine normative gap regarding BDSM. There is no explicit reference to these practices in Spanish law; instead, they are subsumed under general provisions (offences against bodily integrity, general rules on consent and contracts) that were not designed with consensual violent sex in mind (Código Penal, 1995; Constitución Española, 1978). Case law has reaffirmed this stance in emblematic decisions such as STS 1049/2002, even imposing prison sentences for conduct between voluntary adults, which has understandably caused concern among BDSM communities and civil-liberties oriented jurists (Tribunal Supremo, Sala Segunda, 2002; Brown et al., 2020). At the same time, the absence of specific regulation produces legal uncertainty: practitioners lack a framework in which their agreements are recognised, or any clear indication of how far they may go without crossing into illegality (Carrera García, 2020).

The current situation can be summarised as follows: in Spain, sadomasochistic practices are not prohibited as such, but if injuries occur in the course of those practices, the perpetrator will be convicted for those injuries, regardless of whether the sentence is reduced by application of Article 155 of the Criminal Code (Código Penal, 1995, arts. 147–

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148, 155; Tribunal Supremo, Sala Segunda, 2002). This, combined with social stigma, means that many cases remain hidden and that a kind of tacit silence surrounds BDSM, as a strategy to avoid legal exposure (Brown et al., 2020; Carrera García, 2020).

From a bioethical perspective, the discussion has highlighted the plurality of values at stake; the examination of practical and jurisprudential cases has confirmed the need to nuance and refine institutionally entrenched theoretical positions (UNESCO, 2005; Andorno, 2009; Beyleveld & Brownsword, 2001). We have seen how Spanish courts respond strictly in extreme scenarios (homicides within sadomasochistic settings, very serious injuries), but also how less dramatic cases can generate complex dilemmas (Tribunal Supremo, 2002). Likewise, cases such as the decision of the Spanish Data Protection Agency (AEPD, 2019) underline that other rights orbit the BDSM context – privacy, image, dignity – which deserve robust protection even when there was initial consent (Constitución Española, 1978, arts. 10, 18; European Court of Human Rights, 1997).

Finally, the article has proposed several elements for a potential normative framework: from amending the Criminal Code to recognise (within limits) the effectiveness of consent in BDSM-related injuries, to measures such as clinical protocols, training for legal operators, and evidentiary safeguards to distinguish genuine consent from ex post facto rationalisations (Código Penal, 1995; Tribunal Supremo, Sala Segunda, 2002; Brown et al., 2020; Bezreh et al., 2012). These proposals aim to fill the legal vacuum by orienting State intervention towards those areas where it is truly needed: intervening when consent is absent or when certain gravity thresholds are exceeded, while refraining from criminalising or further stigmatising consensual private practices that do not produce tangible social harm (Constitución Española, 1978; AEPD, 2019; European Court of Human Rights, 1997).

Throughout, it has been emphasised that any regulation must preserve a delicate balance: neither absolute permissiveness (which could open the door to impunity for aggressors) nor total prohibition (which would infringe adult autonomy). BDSM, law, and bioethics converge on the need to move towards a more sensitive and fine-grained framework. Legislative and doctrinal developments typically lag behind social change; in this field, however, it seems that the time has come to confront the issue openly. This delicate normative and ethical challenge demands dialogue between lawyers, philosophers, psychologists, affected communities, and society at large, with the aim of forging a consensus that decriminalises what does not merit censure and clarifies the criminal response to what does – abuse, non-consensual violence, irreparable harm (Brown et al., 2020; UNESCO, 2005).

In short, there is no fundamental right to renounce fundamental rights. This means that, however far we wish to press our freedom, there will always remain an irreducible core (life, dignity) that is not at our disposal (Constitución Española, 1978, arts. 10, 15; European Court of Human Rights, 1997). In the case of BDSM, it could scarcely be otherwise.

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Normative and jurisprudential sources

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Table 1. Population-based studies reporting the prevalence and profile of BDSM-related fantasies and practices in general adult samples.

Study	Year	Country/Region	Type of measure	Key result
Herbenick et al.	2017	United States (national sample)	Lifetime practices (e.g., tying/being tied, spanking)	≈20% tying/being tied; ≈30% spanking; ≈13% playful "whipping"
Holvoet et al.	2017	Belgium/Europe (general population online survey)	BDSM fantasies and activities	46.8% some activity; 22% fantasies only; 12.5% regular practice; 7.6% self-identification
Joyal & Carpentier	2017	Canada (provincial)	Interests/paraphilias (fantasies and behaviors)	Fantasized masochism: 23.7% women; 13.9% men (other BDSM interests common)
Richters et al.	2003	Australia (Sex in Australia)	Practices in the last 12 months	≈2% men and ≈1.4% women report BDSM in 12 months
Richters et al.	2008	Australia (Sex in Australia)	Demographic and psychosocial profile of practitioners	Characterization of B/D, S/M, or D/S practitioners; confirms non-marginality
Brown, Barker & Rahman (review)	2020	International review	Prevalence review (lifetime/12 months; fantasies)	Practice ≈2–17% depending on definition; fantasies/ interest widely extended
Bezreh, Weinberg & Edgar	2012	USA (sexual education)	Stigma management and education; quote on explicit negotiation	Highlights centrality of explicit negotiation of limits

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